Nos. 80-54 and 80-5049

IN THE

Supreme Court of the United States

October Term, 1980

ITT GILFILLAN, a Division of International Telephone and Telegraph Corporation, a corporation,

Petitioner,

vs.

CLIFFORD E. CLAYTON,

Respondent.

CLIFFORD E. CLAYTON,

Petitioner,

vs.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, and its LOCAL NO. 509,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONER ITT GILFILLAN.

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QUESTIONS PRESENTED FOR REVIEW.

1. Does an employee's failure to exhaust internal union remedies, which were found to be adequate by the district court, bar his action against the company as well as the union?

2. Is the union a necessary and indispensable party for an employee to prove that the union breached its duty of fair representation?

3. May an employee who knowingly chooses not to exhaust internal union procedures, proceed solely against the company and require the company to present the union's defense to the alleged breach of the duty of fair representation?

4. May internal union remedies be deemed adequate to bar an action against the union because of an employee's failure to exhaust those remedies, but be deemed inadequate to bar an action against the company because they cannot provide reinstatement of the grievance?

5. Does the fact that the internal union remedies only provide monetary damages and do not provide for reinstatement make those remedies "inadequate" as a defense?

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BRIEF FOR PETITIONER ITT GILFILLAN.

Statement of the Case.[1]

This case arises from the discharge of Clifford E. Clayton ("Clayton") by his employer, ITT Gilfillan[2] ("Company") on February 14, 1975. Clayton was a member of and represented by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, and its Local 509 (jointly referred to herein as "Union" or "UAW") which had a collective bargaining agreement ("Agreement") with the Company. That Agreement contained a mandatory grievance and arbitration procedure and within the time limits allowed by the Agreement, the Union filed a grievance on Clayton's behalf contesting the discharge. After a thorough investigation of the discharge, the

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[1]Although ITT Gilfillan is a petitioner and was entitled to file an opening brief, the parties, with the concurrence of the Clerk of the Court, agreed that since Clayton had to address positions taken by ITT Gilfillan and the UAW it would be more logical for Clayton to file the opening brief and for ITT Gilfillan and the UAW to file responding briefs. Thus this brief is filed in accordance with the Court's rules governing respondent's briefs.

[2]ITT Gilfillan is a division of International Telephone and Telegraph Corporation. That corporation has the following subsidiaries (not wholly owned) and affiliates:

ITT Consumer Services Corporation
ITT World Directories Inc.
Bell Telephone Manufacturing Company
Compagnie Generale de Constructions Telephoniques
Compania Standard Electrica Argentina
Standard Electrica S.A.
Standard Elektrik Lorenz A.G.
Standard Telefon OG Kabelfabrik A/S
Standard Telephones and Cables Pty. Limited
Grohe Handels G.m.b.H.
I.A.O. Industries Riunite Spa
H.W. Liebrich G.m.b.H.
Hartford Fire Insurance Company
Transatlantische Ruckversicherungs AG

Omitted from the list are the names of other subsidiaries since, if considered in the aggregate as a single subsidiary, they would not constitute a significant subsidiary.

pursuit of the grievance through the third step of the grievance procedure, and a timely request for arbitration, the Union withdrew the grievance. (J.A. 22).[3]

Clayton, a Union shop steward,[4] did not attempt to invoke the internal union remedies available to challenge the Union's refusal to pursue his grievance. (J.A. 23). Instead, he filed a lawsuit in federal district court, (J.A. 3), alleging that the Union breached its duty of fair representation and that his discharge was in breach of the Agreement (*i.e.*, the Company did not have "just cause" for his discharge). (J.A. 4, para. 7). The Company and the Union denied that either the Agreement or the duty of fair representation had been breached. The Union and the Company raised as an affirmative defense, the failure of Clayton to exhaust internal union remedies. (J.A. 12, para. 15; and J.A. 18, para. 15).

The internal procedures of the UAW for reviewing and remedying the actions of Union officials are extensive and complete. They are designed to offer opportunities for the just disposition of legitimate complaints at various points in the process. These procedures provide for the prompt consideration and processing of complaints and allow a complaining member or his counsel the right to fully present his case. (J.A. 83-88, Jt. Ex. E, R.T. 25). Within thirty days of an alleged improper action a Union member has the right to appeal that action to the Amalgamated Local Union. Action by the Amlgamated Local Union on the complaint must occur within forty-five days of the initiation of proceedings by the member. Thirty days after the Amalgamated

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[3]The following abbreviations are used herein in citations to the record: Joint Appendix (J.A.), Reporter's Transcript (R.T.), Record on Appeal (R.); number references are to page.

[4]Clayton held this position from 1967 until he was terminated. (R.T. 139-140).

Local Union acts or if it does not take any action, after the forty-five day period has expired, the member is entitled to appeal to the International Executive Board. This is accomplished by filing an appeal with the International President. Within sixty days after the receipt of the appeal by the President, the International Executive Board must use its best efforts to render a decision. It should be noted that this process can be expedited in appropriate cases with the President deciding an appeal without submitting the issue to that Board. If a decision is made at this level which leaves the member unsatisfied, within thirty days, he may appeal to the Constitutional Convention Appeals Committee ("CAC") or to the Public Review Board ("PRB"). The Union Constitution mandates the exhaustion of these procedures before the institution of judicial proceedings. (J.A. 69-77, Jt. Ex. B, R.T. 24).

Although the UAW Constitution does not explicitly address the remedies that the CAC or PRB can order, it grants each of them broad general powers. The CAC has ". . . the authority to consider and decide all appeals submitted to it" and "(a)ll decisions of the Committee are to be final and binding." (J.A. 73-74). The PRB has the power to ". . . make final and binding decisions on all cases appealed to it . . ." and to ". . . dispose of all facets of the appeal." (J.A. 64-65, 76). In practice, these grants of power have resulted in a broad range of remedies to aggrieved members. The PRB has awarded money damages for union misconduct and has ordered the Union to refile a grievance not properly submitted to arbitration by the Union. (J.A. 96, Jt. Ex. F-1, R.T. 26; J.A. 103, Jt. Ex. F-2, R.T. 26).

The federal district court ordered the trial of this case divided into three parts. The first considered the effect of Clayton's failure to use the internal union remedies reviewed above.

After that phase of the trial, the district court found that: (1) Clayton had failed to exhaust his internal union remedies; (2) those remedies were an appropriate and adequate means of redressing his grievance in that the PRB had the power to grant a range of possible relief including an award of money damages; (3) that Clayton was fully aware of the UAW internal union remedies; and, (4) that pursuit of those remedies would not be futile and therefore Clayton's failure to exhaust them could not be excused. The Court held as a matter of law that Clayton could not maintain his suit against the Union or the Company. (Appendix to Pet. for Cert.: Findings of Fact and Conclusions of Law, 1-11).

On appeal the Ninth Circuit Court of Appeals affirmed the judgment in favor of the Union. However, it reversed the judgment in favor of the Company.

Summary of Argument.

National labor policy has been expressed by the courts to favor the reliance on extrajudicial forums for the resolution of industrial disputes arising out of collective bargaining agreements or their administration. Judicial action is to be stayed pending the consideration of issues being processed through arbitration or internal union procedures.

In order to further this policy, rules of law must ensure the continued strength and vitality of incentives for employees to proceed to arbitration with their grievances and to exhaust internal union remedies. Increased reliance upon judges and juries for adjudication of workplace disputes will not result in greater justice and may substantially interfere with the collective bargaining relationship between employers and unions. Because of their intimate familarity with the law and customs of the shop, arbitrators have been recognized as possessing a special ability in the resolution of industrial disputes. Similarly, internal union procedures have a special capacity for reviewing actions by union representatives, and may lead to the private resolution of conflicts which would otherwise have to be resolved by the courts. Decreased reliance on these private dispute resolution mechanisms will result in an increasing burden on the federal court system which is not as well equipped to handle these disputes as the procedures of arbitration and internal union remedies.

The failure of an employee to exhaust internal union procedures should be a defense both for the union and the employer. It is a fundamental principle of labor law that the establishment of the breach of the union's duty is a condition precedent to establishing that the employer may have breached the collective bargaining agreement. *Vaca v. Sipes*, 386 U.S. 171, 186 (1967). Numerous courts have

also held that a failure of an employee to exhaust adequate internal union remedies is a defense for the union. *See, e.g., Brady v. Trans World Airlines, Inc.*, 401 F.2d 87, 104 (3rd Cir. 1968), cert. denied, 393 U.S. 1048 (1969). In order to further implement the national policy to encourage the private resolution of employer-union-employee disputes, the Court should conclude that employees must exhaust internal union procedures before instituting suit against the union or the employer. By providing that their failure to do so bars their court action, employees will be encouraged to use private dispute resolution procedures. Consequently, the use of internal union remedies has the potential to substantially reduce the number of the duty of fair representation cases in the federal court system.

As a matter of fundamental fairness, there are several factors that dictate that the employer be entitled to rely on the employee's failure to exhaust internal union remedies. The duty of fair representation is the union's obligation, not the employer's. If the union is not a party to the determination of that issue, the employee will prevail upon establishing, prima facie evidence of a breach, unless the employer assumes the burden of defending the actions of the union. The evidence necessary to establish such a defense is usually completely within the union's possession. Thus the employer is not in the best position to defend against the employee's claim. In order to prevent a finding that the union breached its duty, the employer must engage in the complete discovery of internal union documents and evidence bearing on the issue. However, since the union is no longer a party or liable upon a finding of a breach of the duty, it will have little incentive to assist the employer in presenting this defense.

Another factor pointing to the union's indispensability is the fact that the union has a continuing responsibility to

interpret and administer the collective bargaining agreement. The union has a vital interest in the interpretation of the collective bargaining agreement since it has the duty to administer it with respect to other bargaining unit members. The district court cannot fully understand and appreciate the union's position and the impact of the court's interpretation of the collective bargaining agreement upon the bargaining unit unless the union is a party to the litigation. In order to ensure an interpretation of the agreement consistent with the union's role in its day-to-day administration, the union must be a party. To hold otherwise would be to compromise the union's interest in protecting the other union members in the bargaining unit.

Although an employee may be excused from exhausting internal union procedures where they would result in an inadequate remedy or their pursuit would be futile, this is not such a case. It is well recognized that the UAW procedure is an exemplary model of an adequate union remedy. This procedure can result in the award of money damages or an order for the union to resubmit an employee's complaint to the contractual grievance and arbitration process. Section 101(a)(4) of the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA") (29 U.S.C. §411(a)(4)) provides that an employee can be required to invoke an intraunion remedy for a four month period. The UAW process is designed so that not only will an initial decision be made within the four month period, but with the possibility of a final decision being issued within that period. For this reason, an employee cannot claim that the remedy is inadequate.

It is the Company's position that the Union's internal remedies are adequate and that the Company as well as the Union is entitled to rely on Clayton's failure to exhaust those remedies. The national labor policy in favor of the

private resolution of labor disputes fully justifies this finding, even though the union remedy cannot guarantee the reactivation of the grievance procedure or the reinstatement of Clayton.

An alternative position taken by the Company is that because of national labor relations policy, Clayton's exhaustion of his internal union remedies could have resulted in the reactivation of his grievance and the arbitration of the underlying dispute. Employers and unions are deemed to be aware of the strong national policy in favor of arbitration and the private resolution of labor conflicts when they negotiate collective bargaining agreements. Based upon the theory adopted by the Court in *Nolde Bros. Inc. v. Bakery Workers*, 430 U.S. 243, 255 (1977), it may be concluded that national labor policy requires the employer to reinstate an employee's grievance upon a finding that the union breached its duty of fair representation. The internal union remedies are impliedly incorporated into the grievance and arbitration process. Consequently, an employer can rely on the non-exhaustion of the procedure and, so long as the collective bargaining agreement does not expressly prohibit the reinstatement of the grievance, a finding of the breach of duty can result in the reinstatement of the grievance.

If the Court does not accept any of the foregoing theories, then it should remand the Company and the Union to district court for trial of the breach of the duty of fair representation issue. An affirmation of the decision by the Ninth Circuit would place an unfair burden on the Company to defend the Union's action. Additionally, relieving the employee of any responsibility to exhaust internal union procedures and excusing the union from any liability, substantially interferes with the union's statutory right to be the exclusive representative of the collective bargaining unit. The employee may circumvent the union's good faith refusal to

take a matter to arbitration. Without the Union as a party he may establish a breach by showing prima facie evidence of it, and thereby obtain a hearing on the underlying grievance. In addition, the Ninth Circuit decision leaves the possibility of collusive action between the employee and the union. The Union may find it politically imperative to support the employee's claim. Furthermore, the policy established in *NLRB v. Marine Workers*, 391 U.S. 418 (1968), supports a conclusion that a breach of the duty of fair representation cause of action can never be barred by the failure to exhaust internal union remedies since such a claim does not solely involve "the internal affairs of the Union. . . ." 391 U.S. at 427, n. 8.

The following, in order of the Company's preference, is a summary of three possible dispositions the Court could make in this case:

First, the Court may decide that the Company is entitled to rely on the plaintiff's failure to exhaust internal union remedies. This would preserve those remedies and strengthen their function as an integral part of national labor policy. The Argument in parts I and II sets forth the reasons supporting such a decision.

Second, the Court could conclude that since all collective bargaining agreements have been negotiated in light of the national policy to promote collective bargaining and to foster private settlement of labor disputes (both by means of internal union procedures and independent arbitration), if a union is found to have breached its duty of fair representation, the underlying contract dispute must be decided by arbitration under the collective bargaining agreement, unless that agreement specifically provides otherwise. The time limits in the collective bargaining agreement within which

a grievance must be processed, would be suspended during the processing of the breach of fair representation claim. If in fact a breach were found, the grievance would be reactivated and the parties would return to arbitration, the bargained for method of resolving collective bargaining disputes. This result would be consistent with national labor relations policy and relieve the federal courts of a significant number of cases alleging a breach of the duty of fair representation pending in the federal courts. Failure of an employee to exhaust his internal union remedies would constitute a complete bar to any action against his union or employer. This alternative is reviewed in part III of the Argument.

Third, the Court could find that employees do not have any obligation, under any circumstances, to exhaust internal union remedies in a duty of fair representation case and remand the Company and the Union to district court for trial. This alternative is reviewed in Part IV of the Argument. Under this result, the Union would be a party in the determination of the breach of its duty of fair representation. However, unless the Court ordered the case to be referred to an arbitrator in the event a breach of the duty was found, the lower court or a jury could decide the underlying breach of contract issue. The adverse effect of such a fact finder upon national labor policy, with its stated preference for the use of arbitrators to decide collective bargaining agreement disputes, would be incalculable.

ARGUMENT.

INTRODUCTION.

This case presents the Court with an opportunity to issue a decision to clarify national labor relations policy with respect to the use of internal union remedies prior to the institution of a lawsuit alleging a breach of the duty of fair representation. This case also provides a vehicle for the Court to reaffirm the use of arbitration for the determination of the underlying contract dispute in the event there is a conclusion that the union breached its duty of fair representation.

In reviewing the issues presented in this case, the national labor policy of the Steelworkers Trilogy[5] and innumerable subsequent cases, must be maintained in focus. That policy requires the arbitration of all disputes arising under a collective bargaining agreement containing an arbitration clause ". . . unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute."[6] The Court also stated that "[d]oubts should be resolved in favor of coverage."[7]

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[5]*United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Corp.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

[6]*United Steelworkers v. Warrior & Gulf Navigation Corp.*, 363 U.S. at 582-583.

[7]*Id.*, at 583.

Since the Steelworkers Trilogy decisions in 1960 there have been thousands of arbitration awards[8] interpreting and applying collective bargaining agreements. An experienced core of labor arbitrators has developed over the years.[9] Only a small number of these awards are ever challenged in court.[10] Because of the strong national labor policy for the arbitration of disputes over the interpretations and application of collective bargaining agreements, the courts have been relieved of innumerable cases which they would otherwise be called upon to decide.

However, cases involving an alleged breach of the duty of fair representation threaten that national policy and pose the possibility that they will result in a substantial increase

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[8]Volume 35 of Labor Arbitration Reports, published by Bureau of National Affairs, contains arbitration awards published commencing in September 1960. Current arbitration awards are being published in Volume 75 of Labor Arbitration Reports. Each volume reports several hundred labor arbitration awards. These 40 volumes report substantially in excess of 10,000 awards. Commerce Clearing House, an independent reporter of arbitration awards, publishes Labor Arbitration Awards. There is little duplication of the awards published by each company. Since 1960 there have been 40 volumes of Labor Arbitration Awards. In those volumes more than 10,000 arbitration awards have been published. These reported arbitration awards represent only a small percentage of all cases arbitrated. Most awards are not published.

The American Arbitration Association (AAA) reports that 16,669 cases were referred by that organization to labor arbitrators in 1979 and that 7094 arbitration awards were submitted by arbitrators to AAA that year. The Federal Mediation and Conciliation Service (FMCS) reports that during the year October 1979 through September 1980 it received requests for 33,327 arbitration panels and that 8405 arbitration awards were submitted to it. The AAA and FMCS are independent organizations.

[9]FMCS lists more than 1300 labor arbitrators and AAA lists approximately 3000 labor arbitrators.

[10]"The relatively small number of reported cases contesting the countless arbitration proceedings convened to resolve labor-management disputes attests to the parties' general satisfaction with this method of resolving industrial problems." *Piggly-Wiggly, Etc. v. Piggly-Wiggly, Etc.*, 611 F.2d 580 at 581 (5th Cir. 1980).

in the burden that is placed upon the federal judicial system. The requirement that employees exhaust internal union remedies allows the union to police its administration of collective bargaining agreements. In order to encourage the use of that procedure, any employee who fails to use it must be completely barred from any further litigation against the union or the company. This case presents an opportunity for the Court to reaffirm the role of the internal union remedy and the use of arbitration to resolve the underlying dispute.

In contrast to the national labor policy favoring arbitration, a number of courts in the federal judicial system, after concluding that a breach of the duty of fair representation occurred, have either decided the breach of contract issue or submitted it to the jury for its decision.[11] The interpretation of collective bargaining agreements is not one of the normal functions of courts. In fact because of the Steelworkers Trilogy and subsequent decisions, courts have not normally been called upon to interpret collective bargaining agreements. The words of Justice Douglas in *United Steelworkers v. Warrior & Gulf Navigation Corp.*, 363 U.S. 574 at 581-582 (1960), are more appropriate today than when written 20 years ago:

> The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts. . . .
>
> The labor arbitrator's source of law is not confined to express provisions of the contract, as the industrial common law—the practices of the industry and the

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[11] *See e.g., Kirkland v. Arkansas-Best Freight System, Inc.*, 629 F.2d 538, 540 (8th Cir. 1980); *Alvey v. General Elec. Co.*, 622 F.2d 1279, 1282 (7th Cir. 1980); *Pitts v. Frito-Lay, Inc.*, 105 LRRM 3223, 3224 (E.D. Mich. 1980); *Atwood v. Pacific Maritime Ass'n.*, 432 F.Supp. 491, 497 (D. Ore. 1977).

> shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in this knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.

As was recognized in the Steelworkers Trilogy, the parties to a collective bargaining agreement have bargained for the resolution of conflicts concerning the collective bargaining agreement by the use of arbitrators. Those arbitrators have developed an expertise with respect to the "common law of the shop." The parties to a collective bargaining agreement, and the employer in particular, did not bargain for a court or a jury to sit in judgment on their actions. Employers and unions have established a confidence in the ability of arbitrators to decide questions involving the collective bargaining agreement. That confidence does not exist with a judge or jury. Juries especially may be influenced by factors which an arbitrator who possesses knowledge of the "common law of the shop" may find to be of no sig-

nificance. By the very fact that juries constantly change, it would be impossible for them to obtain the underlying knowledge which is necessary for an arbitrator to properly decide a collective agreement question.

In light of this background, the breach of the duty of fair representation concept must be carefully reviewed and placed in its proper perspective. It is imperative that this concept be harmonized with the national labor policy established in the Steelworkers Trilogy.

I.

THE FAILURE TO EXHAUST INTERNAL UNION PROCEDURES IS A DEFENSE FOR THE UNION AND THE EMPLOYER.

A. The Employer Is Seriously Prejudiced by the Ninth Circuit Decision.

In a breach of the duty of fair representation and breach of contract lawsuit, the employer is only secondarily liable. The plaintiff must first prove that a breach of the union's duty has occurred. In any such proceeding the union is a necessary, if not indispensable,[12] party to a finding that it breached its duty of fair representation. If the plaintiff is allowed to sue his employer even though the union has been dismissed because the plaintiff has failed to exhaust internal union remedies, the employer would be placed in the untenable position of attempting to litigate an issue wherein, as in this case, the union was the sole party involved. Although the employer obviously has an "interest" in a determination that a breach of the duty did not occur, it is not in the best position to defend against that charge. As in the instant case, the Company was not involved in the decision to abandon the plaintiff's grievance. That decision, as is

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[12]See Argument II, *infra* p. 27.

normal in the Union-Company grievance procedure, was made by the Union after its internal investigation, without consultation with the Company. The Union and the Company are adversaries who do not confide in each other as to their internal deliberations and decisions with respect to the processing of grievances.

Thus, the Ninth Circuit decision in this case places a difficult, if not impossible, burden on the Company with respect to the breach of the duty of fair representation issue. Under that decision, if any defense is presented to the claim that the Union breached its duty of fair representation, it must be presented by the Company. Unless the Company presents this defense, the plaintiff will prevail upon a prima facie showing of a breach. Why should the plaintiff, who has failed to exhaust his internal union remedies and thus relieved the Union of not only potential liability for its breach, but relieved the Union of its responsibility to present a defense, be entitled to benefit by this act? Even if the Company chooses to present a defense to the breach of the duty issue, it is not in a position to present the case to the same complete extent the Union could. The Company would have to depose the Union witnesses and subpoena Union documents in an attempt to present its position.[13] It should be clear that the Union and its witnesses may have little incentive to fully and openly cooperate with the Company in the presentation of this defense. In fact, the Union is the traditional adversary of the Company and this may affect

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[13]The Federal Rules of Civil Procedure ("F.R.C.P.") provide definite limits on the ability of a party to engage in discovery with a non-party. F.R.C.P. Rule 33 provides that interrogatories may be directed only to parties. Before a non-party can be required to produce documents, "good cause" must be shown for a subpoena duces tecum. F.R.C.P. Rule 30(b)(1). Under F.R.C.P. Rule 34, neither a subpoena duces tecum nor good cause is required to compel a party to produce documents.

the degree of cooperation from union witnesses. In addition, the Union no longer has any monetary liability to the plaintiff even if a breach of the Union's duty is established. Finally, the plaintiff is still a Union member and it may be in the Union's own self-interest to assist the plaintiff's claim against the Company.

Furthermore, the Ninth Circuit decision allows the employee the opportunity to circumvent a union's good faith decision not to pursue a grievance. There is also the possibility that the Union will collude with the employee in order to circumvent the arbitration process, and bring the issue before a jury.

Thus to allow the union and not the employer to use the defense of the failure to exhaust internal union procedures raises possibilities which would destroy a major benefit to be gained from the private resolution of labor disputes.

It is upon this background that the Court must conclude that both the union and the employer are protected by the employee's failure to exhaust internal union remedies.

B. Existing Law.

There are a number of cases which hold that the failure to exhaust internal union remedies is a defense for the employer as well as the union:

Rainey v. Missouri Utilities Co., 596 F.2d 310 (8th Cir. 1979); *Willetts v. Ford Motor Co.*, 583 F.2d 852 (6th Cir. 1978); *Dezura v. Firestone Tire & Rubber Company*, 470 F.Supp. 121 (E.D. Pa. 1979), aff'd. mem. 612 F.2d 571 (3rd Cir. 1979); *Aldridge v. Ludwig-Honold Manufacturing Co.*, 385 F.Supp. 695 (E.D. Pa. 1974), aff'd. mem. 517 F.2d 1397 (3rd Cir. 1975), cert. denied, 423 U.S. 937 (1975); *Rehm v. Quaker Oats Co.*, 478 F.Supp. 619 (M.D. Pa. 1979); *Sherba v. Teamsters Local 400*, 101 LRRM 2582 (N.D. Ohio 1979); *Neiger v. Sheet Metal Workers Int'l.*,

470 F.Supp. 622 (W.D. Mo. 1979); *Kobielnik v. International Brotherhood of Teamsters, Etc.*, 470 F.Supp. 125 (E.D. Pa. 1979); *Provencal v. Allegheny Airlines, Inc.*, 383 F.Supp. 159 (D.R.I. 1974).

The reasons for these decisions may be categorized as follows:

1) The policy of the extrajudicial resolution of disputes, especially where a union is involved, requires that an employer be able to rely on the nonexhaustion of internal union remedies as a defense.

2) The exhaustion of internal union remedies is an established condition precedent to deciding the issue of a breach of the duty of fair representation.

3) Fair and adequate internal union procedures can result in an adequate remedy for an aggrieved employee and they should be given a full opportunity to function.

There are also a number of cases which hold that an employer is not entitled to raise this defense:

Geddes v. Chrysler Corp., 608 F.2d 261 (6th Cir. 1979); *Fizer v. Safeway Stores, Inc.*, 586 F.2d 182 (10th Cir. 1978); *Winter v. Local Union No. 639, Etc.*, 569 F.2d 146 (D.C. Cir. 1977); *Peterson v. Rath Packing Company*, 461 F.2d 312 (8th Cir. 1972); *Anderson Grocers Supply Co., Inc.*, 483 F.Supp. 73 (S.D. Tex. 1979); *Miller v. Local 50, Am. Fed. of Grain Millers*, 468 F.Supp. 193 (D.Neb. 1979).

The reason for these decisions may be summarized as follows:

1) The union constitution, from which internal union remedies arise, is a contract between the union and its members and therefore because the company is not a party to that contract it may not rely on it.

2) Allowing the employer the right to rely on an employee's failure to exhaust intraunion remedies will not

further the judicial policy underlying restraint in interfering in intraunion affairs.

There are also a number of cases which hold that the employer cannot rely on the exhaustion defense unless the underlying grievance can be reinstated as a result of the use of internal union remedies.

Murray v. Branch Motor Express Co., ... F.2d .... (4th Cir. 1980); *Tinsley v. United Parcel Service Inc.*, ... F.2d .... (7th Cir. 1980); *Clayton v. ITT Gilfillan*, 623 F.2d 563 (9th Cir. 1980); *Varra v. Dillon Companies, Inc.*, 615 F.2d 1315 (10th Cir. 1980); *Harrison v. Chrysler Corp.*, 558 F.2d 1273 (7th Cir. 1977); *Orphan v. Furnco Constr. Corp.*, 466 F.2d 795 (7th Cir. 1972); *Gerb v. Boeing Company*, 102 LRRM 2854 (E.D. Pa. 1979); *Neipert v. Arthur G. McKee & Co.*, 448 F.Supp. 206 (E.D. Pa. 1978); *Pawlak v. International Broth. of Teamsters, Etc.*, 444 F.Supp. 807 (M.D. Pa. 1977), aff'd mem. 571 F.2d 572 (3rd Cir. 1978).

C. National Labor Relations Policy Requires the Exhaustion of Internal Union Remedies.

The duty of fair representation is a judicially created concept arising out of *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1954); *Humphrey v. Moore*, 375 U.S. 335 (1964); and *Vaca v. Sipes*, 386 U.S. 171 (1967). That doctrine requires a union to fairly and equitably represent all of its members and is derivative of its right to exclusively represent its members. This doctrine is used to allow an employee the right to receive a hearing on a contractual grievance if the union has breached its duty and the employee would otherwise be foreclosed from a hearing. The doctrine was created with a view towards protecting the employee from arbitrary action by the union in refusing to pursue a grievance. It is only after the employee proves the condition

precedent of the union's breach of its duty that he may pursue the employer.

> "For these reasons, we think the wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, *provided* the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance." *Vaca v. Sipes*, 386 U.S. 171 at 186 (1967). (Emphasis added.)

Courts have been careful not to unduly intrude upon the union's duty and responsibility toward its members without allowing the union to review its own action. Thus the concept of exhaustion of internal union remedies was judicially introduced as a defense to the breach of the duty of fair representation action.

> "It has been the general rule, and the rule of this circuit, that before a suit against a union for breach of its duty of fair representation may be brought in the courts, the member must first exhaust the available internal union remedies, or show an adequate reason for failing to do so. There is good reason for this rule which forestalls judicial interference with the internal affairs of a labor organization until it has had at least some opportunity to resolve disputes concerning its own legitimate affairs." *Brady v. Trans World Airlines, Inc.*, 401 F.2d 87 at 104 (3rd Cir. 1968), cert. denied, 393 U.S. 1048 (1969).[14]

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[14]*See, e.g., Tinsley v. United Parcel Service, Inc.*, ... F.2d .... (7th Cir. 1980); *Murray v. Branch Motor Express Co.*, ... F.2d .... (4th Cir. 1980); *Clayton v. ITT Gilfillan*, 623 F.2d 563 (9th Cir. 1980); *Varra v. Dillon Companies, Inc.*, 615 F.2d 1315 (10th Cir. 1980); *Rainey v. Missouri Utilities Co.*, 596 F.2d 310 (8th Cir. 1979); *Willetts v. Ford Motor Co.*, 583 F.2d 852 (6th Cir. 1978); *Winter v. Local Union No. 639, Etc.*, 569 F.2d 146 (D.C. Cir. 1977); *Dezura v. Firestone Tire & Rubber Company*, 470 F.Supp. 121, aff'd mem. 612 F.2d 571 (3rd Cir. 1979).

This defense must be available to the employer as well as the union in order to ensure that the objectives of national labor relations policy are achieved. The entire system of labor relations policy in the United States is built upon the use of private dispute resolution procedures. As fully recognized with respect to arbitration decisions, these private procedures are beneficial to the employer, the union, the employee, and the public at large. Arbitrations are a speedy and economical procedure which relieve the court system of innumerable cases.

Internal union procedures serve the same function with respect to an alleged breach of the duty of fair representation. Internal union appellate bodies are given an opportunity to review the acts of their locals. That review provides the union with an opportunity to govern its own organization. The time spent in such a review would be substantially shorter than that required in seeking court review. Therefore, the burden imposed on the employee is not significant, especially in light of the four month period in §101(a)(4) of the LMRDA. In contrast to this slight burden on employees, there is the benefit gained by providing the union the opportunity to resolve the claim before it reaches court. The resulting decrease in the burden on the federal court system is beneficial to society as a whole.

To adopt the decision of the Ninth Circuit would be to substantially impair the collective bargaining process and the value of the policy of requiring employees to exhaust internal union procedures. If the union decides in good faith that a grievance should not be taken to arbitration, the aggrieved employee would decide to sue only the employer. He would knowingly not choose to exhaust internal union procedures. Since the union cannot be made a defendant because the employee has failed to exhaust his internal union remedies, the employer, if anyone, must attempt to defend

the union's action. However, the employer is not in a position to present a defense as strong as the union could present. Further, at this stage of the proceeding, the union has no incentive to assist the employer. Because of these facts, the employee may prevail on a prima facie showing and be entitled to a judicial or arbitral review of the underlying contract dispute, in spite of the union's good faith decision not to arbitrate the grievance. This is obviously not in accord with national labor policy. The employee has usurped the union's statutorily mandated "exclusive" right to represent bargaining unit employees. Labor Management Relations Act of 1947 ("LMRA") Section 9(a), 29 U.S.C. § 159(a). In order to prevent this emasculation of the statutory mandate, both the employer and the union must be entitled to use the employee's failure to exhaust internal union remedies as a defense.

Such a conclusion also comports with general principles of law where liability is dependent on first establishing the liability of another. As established by cases where proof of a breach of a legal duty by one party must be made before attempting to show a breach of a duty by another party, if the plaintiff is unable to establish the first party's breach, he can proceed no further.[15] This principle is illustrated by cases where an injured plaintiff must first obtain a judgment against that tortfeasor before he may seek recovery from the insurance company of the tortfeasor. A failure in proof as to the tortfeasor is a failure as to the insurer.[16]

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[15]"And, when sued jointly with the servant, a judgment against the master alone, based upon respondeat superior, cannot stand." *Seaboard Airline R. Co. v. Coastal Distrib. Co.*, 273 F.Supp. 340 at 343 (D.S.C. 1967). *Accord, Jentick v. Pacific Gas & Electric Co.*, 18 Cal.2d 117, 114 P.2d 343 (1941).

[16]*Accord, e.g. Fagnon v. Great Central Ins. Co.*, 577 F.2d 418, 420 (7th Cir. 1978).

"Such liability cannot be established where the injured parties have waived their claims against the alleged wrongdoer." *Anderson v. McNally,* 150 Cal.App.2d 778 at 781, 310 P.2d 975 (1957).

It follows that it is also a prerequisite to an employee's case against his employer, that he first prove in an action against the union that the duty of fair representation was breached. Once the union is dismissed from the case, whether it be from an adjudication that no breach occured or because the employee did not pursue internal union procedures, the employee should be judicially foreclosed from establishing a breach of the duty.

D. Plaintiff's Internal Union Remedies Were Adequate to Afford Him Relief.

It is only when the pursuit of internal union procedures would result in an inadequate remedy or their pursuit would be futile that an employee should be excused from exhausting them.

The exhaustion of the UAW internal union remedies would have afforded Clayton an adequate remedy. As has been noted by many courts, the UAW procedure is a superior example of an effective intraunion means of providing relief for aggrieved union members. *See, e.g., Battle v. Clark Equip. Co.,* 579 F.2d 1338 (7th Cir. 1978); *Fleming v. Chrysler Corp.,* 416 F.Supp. 1258 (E.D. Mich. 1975), aff'd. 575 F.2d 1187 (6th Cir. 1978). This procedure is structured so that final relief from the PRB is possible within the four month period specified under Section 101(a)(4) of the LMRDA. Under the UAW procedure, action by a local union on a complaint must be taken within forty-five days after the initiation of the intraunion procedure. Within thirty days thereafter, the employee can appeal to the International Executive Board ("IEB") which is to use its best efforts

in rendering a decision within sixty days. If the President of the Union has not expedited the process, an appeal, after this maximum 115 day period, may be taken to the PRB which is the final step in the appeal process. (J.A. 69-77). Although there is no guarantee that a final decision will be rendered within the four month period, it is specifically provided that an initial determination on the claim will be made within forty-five days by the local union and that this decision will be reviewed by the IEB within ninety days. In *Jenkins v. General Motors Corporation,* 364 F.Supp. 302 at 308 (D.Del. 1973), the court stated that a union procedure need only hold out a "realistic possibility" that an initial decision be rendered within the four month period and held that the UAW procedure satisfied this requirement. *Accord, Harris v. International Longshoremen's Asso., Local 1291,* 321 F.2d 801, 805-806 (3rd Cir. 1963).

The Ninth Circuit was in error in assuming reinstatement to be the only adequate remedy in a case involving the discharge of an employee. The district court was correct in its analysis of the issue. It found that the Union could grant money damages for a breach of the Union's duty. Because this award could compensate both for lost wages and prospective injury it was held that this was an adequate remedy to an aggrieved plaintiff. This result is in accord with a substantial body of law which holds that prospective monetary damages cannot be rejected as an alternative to reinstatement merely because they may be difficult to quantify. *See, Thompson v. Brotherhood of Sleeping Car Porters,* 367 F.2d 489, 493 (4th Cir. 1966), *citing, John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543 (1964) and *Textile Workers Union of America v. Lincoln Mills,* 353 U.S. 448 (1956). Further, other courts have stated that prospective monetary damages may be the remedy of choice in situations where, such as here, there is a lengthy delay between the

award of the remedy and the event upon which it is based.[17] This recognizes the substantial changes that occur with the passage of time both as to the employee and as to the employing organization. The employee may not be able to perform his old job because of technological changes since the content of work continues to change as new products and procedures are developed. In fact an employee's job may no longer exist.

> "Reinstatement still may not be the appropriate form of prospective relief in this case, however, for it may be that the six year delay since discharge has made reinstatement impractical. . . . If such impracticality exists, we can see no reason why an award for future lost earnings would not be in order. . . ." *De Arroyo v. Sindicato de Trabajadores Packing., AFL-CIO*, 425 F.2d 281 at 292 (1st Cir. 1970).

Because of the adequacy of the remedy to plaintiff and the policies discussed above, the Company should be entitled to rely on the employee's failure to exhaust his internal union remedies.

II.

THE UNION IS AN INDISPENSABLE PARTY.

A. Factors Upon Which Indispensability Should Be Determined.

In an action such as the plaintiff has brought here, the Union is an indispensable party. A court may not proceed to make a determination on the breach of the duty of fair representation without the Union being present. F.R.C.P., Rule 19. Since the Court of Appeals has dismissed the Union from this case, the remaining portion of the case against the

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[17]Clayton was discharged on February 14, 1975.

Company must also be dismissed because of the impossibility of joining an indispensable party.

Although the employer is not a necessary party to an action by an employee against his union for breach of the duty of fair representation (*Kaiser v. Local No. 83*, 577 F.2d 642 (9th Cir. 1978)), the same is not true when an employee attempts to sue his employer for breach of the collective bargaining agreement. The plaintiff may not sue his employer in such a case unless he can first establish that the union has breached its duty of fair representation under the standard set forth in *Vaca v. Sipes*, and subsequent cases. Proof of the breach of the duty of fair representation is a threshold finding that must be made before the court can consider the issue of whether or not the collective bargaining agreement was breached. Such a finding may be made in a separate civil suit against the union, prior to the suit against the employer, or it may be made in the same action where the employer is a defendant, so long as such a finding is made before there is a determination of the breach of contract issue. In determining whether or not a breach of the duty of fair representation occurred, the union is not only a necessary party, but an indispensable party.

In reaching a decision of whether a party is indispensable, a court must determine "whether in equity and good conscience the action should proceed among the parties before it." F.R.C.P. Rule 19(b). The first factor to be considered is "to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties." *Id.* Also important are ways in which the prejudice might be lessened, the adequacy of a judgment rendered in the party's absence, and whether an adequate remedy will be provided to plaintiff if the action is dismissed. *Id.*

B. Failure to Join the Union Would Be Prejudicial to the Company.

It is a matter of fundamental fairness that if the case against the union is dismissed because the plaintiff failed to exhaust his remedies against the union, then the plaintiff's suit must also be dismissed against his employer because the union is no longer a party. As has been recognized by the courts in several instances ". . . it is simply unfair to expect the Employers to litigate and defend the Union against plaintiffs' claim of unfair representation." *Atwood v. Pacific Maritime Ass'n.*, 432 F.Supp. 491 at 495 (D.Ore. 1977); *See, Kinnunen v. American Motors Corporation*, 56 F.R.D. 102 at 103 (E.D. Wis. 1972).

It would be extremely difficult for the Company to prepare for and present a defense to the claim that the Union had breached its duty of fair representation. Because the Company and the Union are traditional adversaries, Union witnesses would be reluctant to testify on behalf of the Company. Since the Union is not a party, some of the usual F.R.C.P. discovery mechanisms are not available.[18] There would not be any financial incentive for the Union to forget this traditional role; if it is no longer a party to the suit, the Union will no longer have any exposure to monetary liability even if the plaintiff establishes a breach of the Union's duty of fair representation.

The anomolous situation the employer would be in if it had to defend the union's actions, as well as its own, was recognized by the Ninth Circuit.

> "Conditioning the employer's use of the internal exhaustion defense on the adequacy of internal union remedies produces an anomaly. Where the employer

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[18]See footnote 13.

> raises the affirmative defense of failure to exhaust the contract's dispute resolution machinery, and where the employee has failed to exhaust internal union procedures, the employer will be required to defend the union's representation of its members. In an action from which the union has been dismissed, ITT, to prevail on its affirmative defense, must defend the UAW's good faith in declining to prosecute Clayton's grievance." Rev. Op. pp. 22-23, 623 F.2d at 570.

Not only would it be anomalous for the Company to defend the Union's actions, but proof of the union's breach is a crucial element of the plaintiff's case. As was stated by this Court in *Vaca v. Sipes*, 386 U.S. at 193 (1967):

> ". . . the fact is that the question of whether a union has breached its duty of fair representation will in many cases be a critical issue in a suit under LMRA §301 charging an employer with a breach of contract."

Because of the critical nature of the proof of this issue it is inappropriate to make the determination that the union has not acted in good faith in the absence of the union. *Kinnunen v. American Motors Corporation*, 56 F.R.D. at 103. The union has the best access to any evidence bearing on any alleged breach of its duty of fair representation. The duty of fair representation is the union's, not the employer's. "While the Employers certainly have an interest in this issue and may participate in its trial, they should not be required to assume sole responsibility . . ." for it. *Atwood v. Pacific Maritime Ass'n.*, 432 F.Supp. at 495.

There is another element of fairness that should prevent the dismissal of the Union in this case. The litigation has progressed for a substantial period of time and has reached this Court with the Union as a party. This was important to the court in *Atwood* where it was noted that the defendant

employers had prepared their case relying on the presence of the unions as defendants.

It should also be noted that the Ninth Circuit's decision reflects a degree of naïvete concerning the interest of the Union in assisting the Company should the Union be dismissed as a party. It could well be in the interest of the Union to assist a union member in procuring a judgment against the Company instead of aiding the Company in presenting a defense against a claim that the Union breached its duty. Such collusion and circumvention of the grievance and arbitration procedures of the collective bargaining agreement would not be in the furtherance of justice and should not be encouraged.

C. A Judgment Rendered Without Joinder of the Union May Result in the Misinterpretation of the Agreement for Which the Union Is Statutorily Responsible.

If the Union is found to have breached its duty of fair representation, the contract must be interpreted to determine if the Company was in breach of it. Consequently, the Union must be present "to aid in the Court's interpretaion of the collective bargaining agreement." *Johnson v. Colts, Inc.*, 306 F.Supp. 1076 at 1079 (D. Conn. 1969). This is because "[d]isposition of this action without such unions being present would probably impede their ability to protect their interests in the subject of this litigation; they would not be available to defend the positions they may have taken in administrating the agreement." *Kinnunen v. American Motors Corporation*, 56 F.R.D. at 103.

The necessity of the Union as a party is further highlighted by the relief sought by plaintiff. Reinstatement is a pervasive remedy affecting the relative status of employees in the collective bargaining unit. Because of this and the contin-

uing responsibility of the union and the employer in implementing the contract the union must be made a party to its interpretation.

In *Bradley v. Ford Motor Co.*, 417 F.Supp. 23 at 25 (N.D. Ill. 1975), the court was faced with this situation and stated:

> "The plaintiff seeks reinstatement to his employment and seniority rights, and this remedy would affect the status of other members of the union who are employees of the defendant company. Therefore it seems to us that this case could not proceed without the presence of the union, because the requirements of F.R.C.P. 19(b) would not have been satisfied."

For these reasons the Union must be a party to this action if it is remanded for trial. In addition, the fact that the Union is in a superior position to defend against a claim that it breached its duty of fair representation cannot be denied. Further, its interest in protecting the position of other Union members in the face of the possible reinstatement of an employee who has been removed from the workforce for more than five years, is well recognized. *See, e.g., Neal v. System of Board of Adjustment (Missouri Pacific R.)*, 348 F.2d 722, 727-728 (8th Cir. 1965); and *Townsend v. Exxon Co., U.S.A.*, 420 F.Supp. 189, 190, n. 1. (D. Mass. 1976). A decision ordering the reinstatement of Clayton could well result in a detrimental effect upon other employees in the bargaining unit. At the least, the seniority of a number of employees would be affected and Clayton's reinstatement may result in a present employee being laid off. The Union must be a party to any proceeding which could have such profound effects upon the bargaining unit which it is statutorily obligated to represent. LMRA Section 9(a), 29 U.S.C. § 159(a).

III.

AS A MATTER OF NATIONAL LABOR LAW POLICY, THE EXHAUSTION OF INTERNAL UNION PROCEDURES COULD RESULT IN THE REACTIVATION OF THE GRIEVANCE AND ARBITRATION PROCESS.

There is another rationale which can be used to grant the Company protection from the employee's failure to exhaust internal union procedures. This Court can conclude that in light of national labor relations policy, the use of internal union procedures may result, as a matter of law, in the reinstatement of the underlying grievance and its arbitration.

The duty of fair representation is a judicially created obligation of the union. It is not specifically established in either the National Labor Relations Act or the Railway Labor Act. It arises out of a series of decisions commencing with *Steele v. Louisville N. R. Co.*, 323 U.S. 192 (1944), and culminating with the decision in *Vaca v. Sipes*, 386 U.S. 171 (1967). In *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 at 564 (1976), the Court stated:

> "Since Steele v. Louisville N. R. Co., 323 U.S. 192 (1944), with respect to the railroad industry, and Ford Motor Co. v. Huffman, supra, and Syres v. Oil Workers Local 23, 350 U.S. 892 (1955), with respect to those industries reached by the National Labor Relations Act, the duty of fair representation has served as a 'bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.' Vaca v. Sipes, 386 U.S. at 182."

It is fundamental that collective bargaining agreements are assumed to have been negotiated on a foundation of national labor relations policy. The use of internal union procedures by employees to review alleged breaches of the duty of fair representation and the acceptance of that pro-

cedure by courts[19] is a foundational fact upon which all collective bargaining agreements are negotiated. Unless those agreements specifically state to the contrary, it must be conclusively presumed that they incorporate this national policy.

This Court's decision in *Nolde Bros. Inc. v. Bakery Workers*, 430 U.S. 243 (1977), recognized that national labor policy is deemed incorporated in collective bargaining agreements unless it is clearly and unequivocally negated in the agreement.

In *Nolde Bros.* the Court stated:

> "It is also noteworthy that the parties drafted their broad arbitration clause against a backdrop of well-established federal labor policy favoring arbitration as the means of resolving disputes over the meaning and effect of collective bargaining agreements." *Id.* at 254.

The Court cited one of the Steelworkers Trilogy cases as establishing the national labor policy that there is a "strong presumption favoring arbitrability", *Id.*, and stated that:

> "The parties must be deemed to have been conscious of this policy when they agree to resolve their contractual differences through arbitration." *Id.* at 255.

Based on this national policy favoring arbitration, this Court found that unless the collective bargaining agreement "expressly or by clear implication" negates the presumption favoring arbitration, the obligation to arbitrate continues for an indefinite period after the collective bargaining agreement expires. The Court concluded that unless such an express provision is contained in the contract, it must be concluded that the parties to the collective bargaining agreement "*intended to arbitrate all grievances arising out of the contractual relationship*". *Id.* (Emphasis added.)

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[19]See footnote 14.

This analysis applies equally to the factual situation presented in the case presently before the Court. In fact this is a stronger case because it presents a grievance which occurred during the normal term of the collective bargaining agreement. In *Nolde Bros.* the Court dealt with a grievance which occurred after the expiration of the collective bargaining agreement.

The Union and the Company are presumed to have known of the strong federal labor policy in favor of arbitration. They are also presumed to have known of the policy with respect to the Union's duty of fair representation and the obligation of employees to exhaust internal union remedies. In light of this policy, the parties negotiated a broad obligation to arbitrate grievances arising under the Agreement. Article VIII of Agreement (J.A. 31) provides as follows:

> "The Company and the Union recognize the necessity for speedy and equitable adjustment of all grievances or disputes. Both parties pledge their best efforts and cooperation in a joint effort to make the grievance procedure function satisfactory for all concerned."

Article IX of the collective bargaining agreement (J.A. 35), states in Section 1:

> ". . . grievances or disputes as to (1) interpretation or application of an express provision of this Agreement, or (2) any violation of an express provision of this Agreement . . . may be arbitrated. . . ."

It is the Company's position that Clayton was discharged for "just cause." (See: UAW letter to NLRB, J.A. 78-79). Article II of the Agreement, Management Rights, provides that the Company has the right to "discipline, suspend or discharge for just cause." (J.A. 31). Section 10 of Article X, Seniority, (J.A. 40), provides that an employee's seniority "shall be broken and terminated" in the event of "[d]ischarge for cause." As a result of these express pro-

visions of the collective bargaining agreement, the discharge of Clayton was subject to the grievance and arbitration provisions.

Because of the national labor policy favoring arbitration and the broad grievance and arbitration procedure negotiated in the contract, the parties should have, if that was their intent, "expressly or by clear implication" provided that grievances could not be reinstated in the grievance procedure if it was determined that a breach of the duty of fair representation occurred. It must be presumed, in light of national labor policy, that since the parties did not "negate" such reinstatement, they intended that such grievances could be reinstated.

This national labor policy could have been negated by express language in the collective bargaining agreement or by a union review procedure which was limited in scope.[20] As noted above, it was not negated by the collective bargaining agreement. In addition, the PRB of the UAW has broad powers. (*See*, Int'l. Const. J.A. 62-77). In fact in *Pfeiffer*, PRB Decision No. 192 (J.A. 100-109), the International Executive Board, whose decision was affirmed by the PRB, directed the Local to "process a new grievance" on behalf of the employee. (J.A. 102-103). This is similar to the broad power of the internal remedy in *Varra v. Dillon Companies, Inc.*, 615 F.2d 1315, which the court found could result in the reinstatement of the grievance. As a consequence of national labor policy, that court held that the employee's failure to exhaust the internal union remedy was a defense for the employer as well as the union. *Id.* at

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[20]See *Orphan v. Furnco Constr. Corp.*, 466 F.2d at 801, where the court found that the pursuit of the intraunion remedy could not reinstate the grievance, since the Teamsters appeal board had only the power to impose "criminal-type" penalties for breach of the duty of fair representation.

1318. *Accord, Neipert v. Arthur G. McKee & Co.*, 448 F.Supp. 206; *Pawlak v. International Broth. of Teamsters, Etc.*, 444 F.Supp. 807.

Based on the foregoing analysis, it can be concluded that the Union's internal procedure does in fact provide an adequate remedy to Clayton. If he had exhausted the internal union remedy, and it had been concluded that in fact the Union breached its duty of fair representation, the grievance could have been reinstated in the grievance procedure and processed to arbitration. As a result, Clayton's failure to exhaust the available internal union remedies is a defense for the Company as well as the Union.

IV.

THE FAILURE TO EXHAUST INTERNAL UNION REMEDIES SHOULD NOT BE A DEFENSE FOR ONLY THE UNION.

In the event the Court does not find any of the foregoing arguments persuasive, it should be concluded that a plaintiff's failure to exhaust internal union remedies is not a defense for either the employer or the union for a number of reasons.

It is fundamental that internal union procedures cannot result in reinstatement of the employee's grievance unless the union and the employer explicitly agree, or this Court adopts the policy reviewed in Argument III. Absent one of those reasons, or the adoption of the policy set forth in part I of the Argument, it may be the conclusion of the Court that the union remedy cannot result in adequate relief to the employee. Even if the union finds a breach of the duty of fair representation, the employee would still be required to proceed to federal court in order to prove to the court's satisfaction that the union breached its duty of fair representation and that the employer breached the collective bargaining agreement. Requiring the employee to exhaust in-

ternal union procedures in such circumstances is to require a futile act which can consume a substantial period of time and money. The employee is still ultimately required to resort to federal court in order to pursue his claim to reinstatement.

In addition, relieving an employee of any responsibility to exhaust internal union procedures before he may sue his employer, but allowing the union to rely on the failure to exhaust, allows the employee to circumvent a union's good faith determination that the matter should not be arbitrated. Without the union as a party, the employee may prevail on a prima facie showing. Since the union has no potential liability, it may have little incentive to support its decision. In addition, there is the possibility of collusive action between the employee and the union. The union of course is the traditional adversary of the employer and the protaganist of employee claims. If an employee fails to exhaust the available union procedure and instead chooses to sue only his employer, the union, assuming the failure to exhaust internal union procedures is a defense for the union, no longer has any liability for a breach of the duty of fair representation. At this stage of the proceeding, it may be in the best interests of the union to assist the employee in his proof of the breach of the duty of fair representation. At the very least the union may find it politically expedient not to cooperate with the employer in presenting a defense to the alleged breach of the duty. A union may conveniently find that documents it once possessed concerning its conduct and its reasons for dismissing the grievance have disappeared and that the union witnesses cannot fully recall the reasons for their decision.

Further, the decision of the Ninth Circuit provides the union a method to avoid the requirement to arbitrate a grievance. It allows the union the ability to control the grievance

procedure and to require the judicial determination of issues that should be decided in the arbitration process. Such a result is obviously in direct conflict with the national labor policy and should be avoided. Because of these possibilities, it would be more beneficial to completely eliminate the rule requiring the exhaustion of internal union remedies. If the exhaustion of internal union procedures is not a defense for the Union, it would be required to defend its actions, and be liable for damages caused by its breach of the duty. There would be a strong incentive on the part of the union to properly perform its duty of fair representation.

In addition to these practical reasons, the Court's decision in *NLRB v. Marine Workers*, 391 U.S. 418 (1968), raises a question as to whether the exhaustion of internal union remedies may ever be a prerequisite to the institution of a breach of the duty of fair representation lawsuit. Although that case arose out of a NLRB proceeding in which a union member filed an unfair labor practice charge against his union, without exhausting internal union remedies, the opinion speaks in broad terms. Justice Douglas found that Section 101(a)(4) of the LMRDA did not require the exhaustion of internal union remedies prior to filing a charge. He concluded that federal courts "may in their discretion" stay their review for four months where the complaint concerns a strictly "internal union matter." However, the opinion also states that:

> "Where the complaint, as in the instant case, raises a matter that is in the public domain and beyond the internal affairs of the union, the union's internal procedures are, as previously explained, plainly inadequate." *Id.* at 427, n.8.

This reasoning, although in the context of a NLRB proceeding, may be equally applicable to a case involving the breach of the duty of fair representation. As in the *Marine*

Workers case, a breach of the duty of fair representation may be found to be "in the public domain and beyond the internal affairs of the union." *Id.* at 427, n. 8.[21] Based on this analysis it can be argued that an employee, in a case involving the duty of fair representation, never has a duty to exhaust internal union remedies.[22]

Conclusion.

For the reasons discussed above, the Company respectfully requests the Court to reverse the Ninth Circuit judgment with respect to the Company and affirm the judgment of the district court dismissing Clayton's claims against both the Company and the Union.

Respectfully submitted,

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[21]*See, Chambers v. Local U. No. 639*, 578 F.2d 375 at 386 (D.C. Cir. 1978), wherein the court found a breach of the duty of fair representation case to raise "a matter that is in the public domain. . . ."

[22]If the court adopts either of the positions suggested in the prior arguments in this brief (see Summary, *supra*, pp. 10 and 11) the statements in the *Marine Workers* case can be distinguished on several grounds. The statements arose in the context of the National Labor Relations Act; they extend to matters not directly involved in the appeal; and in that case public policy justified the result. In the case at bench, the requirement to exhaust internal union remedies would not inhibit access to any governmental agency and public policy would be promoted by encouraging the use of private dispute resolution procedures.

APPENDIX.

Federal Rules of Civil Procedure.

Rule 19: Joinder of Persons Needed for Just Adjudication

(a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) *Determination by Court Whenever Joinder not Feasible.* If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment ren-

dered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) *Pleading Reasons for Nonjoinder*. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) *Exception of Class Actions*. This rule is subject to the provisions of Rule 23.

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